U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 November 2006

Case No.: 2005-BLA-05617

In the Matter of

K. F.
Claimant

v.

HALL & HYLTON MINING COMPANY, INC.
Employer

And

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances: EDMOND COLLETT, Esq
For Claimant

FRANCESCA L. MAGGARD, Esq.
For Employer

DONNA E. SONNER, Esq.
For Director, Office of Workers' Compensation Programs,
U.S. Department of Labor

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On February 24, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently the case was assigned to me. The hearing was held before me in Hazard, Kentucky on June 22, 2006, at which time the parties had full opportunity to present evidence and argument. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.[1]

I. ISSUES

The following issues are presented for adjudication:[2]

(1) whether the Employer was properly designated as the responsible operator; [3]
(2) whether the Claim was timely filed;
(3) whether the Claimant has pneumoconiosis;
(4) whether his pneumoconiosis, if any, arose from coal mine employment;
(5) whether the Claimant is totally disabled;
(6) whether the Claimant's total disability, if any, is due to pneumoconiosis; and
(7) because this is a subsequent claim, whether the Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits in September 2001 (DX 3). On May 23, 2003, the District Director issued a proposed Decision and Order denying benefits (DX 32). In the proposed Decision and Order, the District Director determined that the Claimant had pneumoconiosis. However, the District Director also determined that the Claimant had neither established that his condition arose from coal mine employment nor established that he was totally disabled, as required by § 718.204. The Claimant, through counsel, requested a formal hearing, and in August 2003, the matter was referred to the Office of Administrative Law Judges for hearing (DX 36).

In June 2004, after the matter was referred to the Office of Administrative Law Judges, but before a hearing was held, Administrative Law Judge (ALJ) Rudolf L. Jansen remanded the matter back to the District Director (DX 37). ALJ Jansen determined that the Department of

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[1] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "EX" refers to Employer's Exhibits; "T" refers to the transcript of the June 22, 2006 hearing.

[2] The parties stipulated that the Claimant has 10 years of coal mine employment (T at 9).

[3] At the hearing, the Employer initially withdrew controversion of the issue of responsible operator, and stipulated that it was the responsible operator (T. at 9). However, at the end of the hearing, the Employer withdrew its stipulation (T. at 27-28).

Labor sponsored pulmonary evaluation provided for the Claimant was inadequate, because it did not provide a "complete and credible pulmonary evaluation sufficient to satisfy the Director's adjudicatory burden under Section 725.406." In the Claimant's case the evaluating physician diagnosed the Claimant with pneumoconiosis, and based that diagnosis on the Claimant's positive X-ray and history of coal dust exposure. As ALJ Jansen stated, "a diagnosis of pneumoconiosis based on a positive chest X-ray alone is not a well documented and reasoned opinion." Therefore, ALJ Jansen returned the matter to the District Director to "complete its evidentiary development responsibilities consistent with the statutory and regulatory requirements." (DX 37 at 37).

After the matter was remanded, the District Director contacted Dr. Imtiaz Hussain, the physician who had conducted the Claimant's pulmonary evaluation, by letter. In this letter the District Director advised Dr. Hussain that the District Director had been able to confirm only eight years of coal mine employment for the Claimant. The District Director then requested that Dr. Hussain provide a "reasoned medical opinion" stating whether the Claimant has a chronic lung disease and, if so, whether the diagnosis represents clinical pneumoconiosis and/or legal pneumoconiosis. Dr. Hussain was also requested to determine whether the condition had been "significantly contributed to" or "substantially aggravated by" dust exposure in coal mine employment, and to categorize the extent of the Claimant's pulmonary impairment. If Dr. Hussain concluded that the Miner had such an impairment, Dr. Hussain was requested to determine the etiology of the impairment, and to assess whether the Claimant retained the respiratory capacity to perform the work of a coal miner (DX 37 at 6-7).

Dr. Hussain responded with the following: "[Claimant] worked in coal mines for 7 yrs. He has long history of tobacco abuse and has moderate impairment based on pulmonary function test. The cause of his disability is mainly tobacco abuse and he does not show signs of severe pneumoconiosis on CXR [chest X-ray]. He does not have clinical or legal pneumoconiosis" (DX 37 at 2).

The District Director then returned the matter to the Office of Administrative Law Judges for hearing (DX 38).

This is a subsequent claim for benefits. See § 725.309. In January 1990, the Claimant filed a claim for benefits. After a full hearing, ALJ Bernard J. Gilday, Jr., on February 1, 1993, issued a Decision and Order denying benefits. ALJ Gilday found that the Claimant had established that he had pneumoconiosis, and that his pneumoconiosis arose out of coal mine employment. However, ALJ Gilday found that the Claimant did not establish that he had any degree of disability. The Benefits Review Board affirmed ALJ Gilday's decision.[4] B.R.B. No. 93-1035 BLA (Aug. 22, 1994).

[4] The Benefits Review Board's Decision addressed only the issue of whether ALJ Gilday's finding that the Claimant was not totally disabled was supported by substantial evidence. The BRB did not discuss whether ALJ's Gilday's finding that the Claimant had established that he had pneumoconiosis was supported by substantial evidence.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The Claimant was born in October 1939 and is, therefore, 67 years old. He is not married and has no dependents. According to his claim for benefits, the Claimant worked in coal mines from 1975 to 1989 (DX 4, 5). The records maintained by the Social Security Administration reflect that the Claimant was employed by coal mine operators for the years from 1979 to 1989, inclusive (DX 6). [5] There is also some evidence that the Claimant worked for a coal mine operator in 1977.[6] The parties were willing to stipulate at the hearing that the Claimant had 10 years of coal mine employment. Such a stipulation is binding on the parties.[7] See 29 C.F.R. § 18.51.

B. Claimant's Testimony

The Claimant testified under oath at the hearing. He testified that he has been a smoker, for 30 years, but has quit a few times (T. at 12-13). The Claimant testified that he started working underground, and worked underground for a couple of years, but most of his employment has been on a "strip job" (T. at 13). As a surface miner, he operated a rock drill, and was exposed to both coal dust and rock dust on a regular basis (T. at 14). He last worked in 1989, and was starting to experience problems with his breathing at the time he stopped work (T. at 15). He feels tired, and sometimes uses an asthma spray that he gets through the Veterans Administration (T. at 15-16).[8] His breathing problems make it difficult to walk, because he gets tired and short of breath. He is unable to walk up hill without getting tired and is unable to cut the grass (T. at 17).

The Claimant testified that he also has problems with high blood pressure, as well as hearing problems and back problems, but it is his breathing problems that prevent him from working (T. at 17).

On cross-examination by the Employer, the Claimant testified that his last employment was with Great American Mining, but that was the same company as Hall & Hylton; they just changed the name of the company (T. at 19-21). The Claimant also testified that he started rolling his own cigarettes about six months before, in an effort to help him quit, because rolling

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[5] However, for the years 1979, 1980, 1982, and 1983, the amount of the Claimant's reported income was insufficient to credit him with a full year of coal mine employment pursuant to § 725.101(a)(32), based on the Bureau of Labor Statistics average wage method of calculation.

[6] This evidence consists of a statement from a co-worker, and is at DX 55 of the Claimant's prior claim. In accordance with § 725.309(d)(1), such evidence may be considered.

[7] The transcript of the hearing reflects that the Employer was willing to stipulate only to 10 years of employment, but was aware that in the previous hearing, ALJ Gilday had found 12 years (T. at 8-9). Although ALJ Gilday credits the Claimant with 12 years of coal mine employment, he notes that the Claimant's employment record does not support this conclusion.

[8] The Claimant served in the U.S. Military from 1962 to 1967 (DX 6).

cigarettes requires effort. He testified that he has previously had a heart attack, and sometimes gets chest pains, for which he takes nitroglycerin (T. at 21-22).

On cross-examination by the Director, the Claimant testified that Jim Hall and Bill Hylton were the owners of both Hall & Hylton and Great American. The Claimant also testified that he had the same job, running a rock drill, when he worked for Great American. He quit working in October 1989, because he was tired of the boss telling him he was lazy (T. at 24-25). On further examination by the Employer, the Claimant testified that he worked at different mine sites, all over the area, when he worked for Hall & Hylton or Great American. At the time he quit, he was working at the Yellow Creek site, and he had been working there for a couple of years (T. at 25-27).

C. Responsible Operator

The Employer, Hall & Hylton Mining Company, contests its designation as the responsible operator. After the hearing, counsel for the Employer submitted documentary evidence establishing that the Great American Mining Company is included on the same insurance policy as Hall & Hylton Mining Company.[9] The Employer asserts that this fact means that the name of Great American Mining Company, rather than Hall & Hylton, should be the responsible operator.

The Director, Office of Worker Compensation programs asserts that Hall & Hylton was properly designated as the responsible operator. The Director asserts that the Claimant's testimony at the hearing is inconclusive on the issue of successor operator. Moreover, the Director points out that according to ALJ Gilday's Decision in the Claimant's prior claim, the Employer, Hall & Hylton, did not contest its designation as responsible operator in the prior claim. Consequently, its stipulation would be binding upon it in the adjudication of this subsequently claim. See § 725.309(d)(4).

The Act states that the Secretary of Labor shall, by regulation, establish standards for apportioning liability for benefits among more than one operator, when such apportionment is appropriate. 30 U.S.C. § 932(h). The term "operator" is defined in § 725.491(a) as "(1) Any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; or (2) Any other person who: … (ii) in accordance with the provisions of § 725.492, may be considered a successor operator; or (iii) paid wages or a salary, or provided other benefits, to an individual in exchange for work as a miner...".

A "successor operator" is defined in § 725.492(a) as any person who, on or after January 1, 1970, acquired a mine or mines; or substantially all of a mine's assets, from a prior operator;

[9] The Claimant did not object to the submission of this document. However, § 725.456(b)(1) states that documentary evidence pertaining to the identification of a responsible operator, which was not submitted to the District Director, shall not be admitted into the hearing record in the absence of extraordinary circumstances. Therefore, even though Claimant's counsel did not object, I decline to admit the document, and I did not consider it.

or acquired the coal mining business of such prior operator; or substantially all of the operator's assets, shall be considered a "successor operator" with respect to any miners previously employed by such prior operator. Mergers, liquidations, and other changes of a business organization's form may also create a successor operator.

Because § 725.495(a) states that the operator responsible for the payment of benefits shall be the potentially liable operator that most recently employed the miner, the designation of "responsible operator" is thereby limited to those entities which may be designated as "potentially liable operators." Section 725.494 discusses "potentially liable operators." A "potentially liable operator" must have been an operator for any period after June 1973 (§ 725.494(b)); must have employed the miner for a cumulative period of not less than one year (§ 725.494(c)); must have employed the miner for at least one day after December 1969 (§ 725.494(d)); and must be capable of assuming financial liability for the payment of benefits (§ 725.494(e)).

The evidence of record establishes that the Employer, Hall & Hylton, employed the Claimant from 1983 to 1989. According to the Social Security Administration's records, the Claimant earned $10,217 in 1989 while working for the Employer. The Claimant also worked for the Great American Mining Company in 1989 and, according to Social Security Administration records, earned $1,887 (DX 6). At the hearing the Claimant testified that he worked in the same location for the last two years of his employment, and that the owners of Hall & Hylton also owned the Great American Mining Company (T. at 24-27). He did not know whether these owners owned different companies for each mine site (T. at 26). He also testified that at the end of his employment, his paychecks came from Great American Mining (T. at 19). At the hearing, the Director's representative noted that that the two companies had the same address (T. at 19).

I find that the evidence of record is insufficient for me to conclude that the Great American Mining Company is in fact a successor operator to Hall & Hylton. The facts that the Claimant describes could in fact describe a successor operator situation, in which Great American is a business entity succeeding Hall & Hylton. However, the evidence that such occurred is insubstantial, and I cannot conclude, based on the Claimant's testimony alone, that Great American Mining Company is in fact a successor operator to Hall & Hylton. I also note that Hall & Hylton was the potentially liable operator that last employed the Claimant for one year, as is required under § 725.495 for designation as a responsible operator. Great American Mining paid the Claimant only $1,887 during 1989, which according to the Bureau of Labor statistics formula mentioned in § 725.101(32), equates to less than 15 days of labor in 1989.

Additionally, the Director asserts that the issue of responsible operator was resolved when the Employer stipulated to its designation in the Claimant's prior claim, and points to ALJ Gilday's Decision. It is true that ALJ Gilday's decision reflects that the Employer did not contest its designation as responsible operator. However, the evidence of record, including the Director's Exhibits admitted by ALJ Gilday and the transcript of the October 1992 hearing at

which ALJ Gilday presided, reflect that the Employer never stipulated to its designation as responsible operator.[10]

Based on the foregoing, I find that the Employer is properly designated as the responsible operator. I also find, however, that the Employer has never stipulated to such designation, so the Employer remained free to controvert its designation in future proceedings. See § 725.309(d).

D. Timeliness

A claim for benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner. § 725.308(a). There is a rebuttable presumption that every claim for benefits is timely filed. § 725.308(c). In this case, the Employer has controverted the timeliness of the Claimant's filing of his claim (DX 38; T. at 9).

The evidence of record includes a transcript of a hearing for adjudication of state worker compensation benefits, and the state worker compensation board decision (DX 25). At the hearing, held in May 1991, the Claimant testified under oath that he was informed by his physician's secretary in 1990 that he had pneumoconiosis, and he then informed his former employer of that fact (DX 25 at 49-50). He also testified in this proceeding that another doctor told him he had "real bad lungs" (DX 25 at 70). The record of this proceeding does not reflect whether the Claimant was told he was totally disabled due to pneumoconiosis.

At the hearing on June 22, 2006, at which I presided, the Claimant did not testify as to when or whether he was informed that he had pneumoconiosis, or when or whether he was informed that he was totally disabled.

Based on the foregoing, I find there is insufficient evidence to rebut the presumption that the Claimant's claim was timely filed. Therefore, I find that the Claimant's claim was timely.

E. Relevant Medical Evidence

In November 2001, Dr. Imtiaz Hussain conducted the mandatory pulmonary evaluation in conjunction with the Claimant's claim (DX 12, 13, 14, 15, 16). See § 725.406. As discussed above, after the matter was remanded, the District Director contacted Dr. Hussain by letter (DX 37 at 6-7). Dr. Hussain provided the written response noted above (DX 37 at 3). There is no evidence that Dr. Hussain examined the Claimant a second time, or conducted any additional tests, before responding to the District Director.

The Claimant presented, in his affirmative case, a medical report from Dr. Glen Baker dated September 2002, as well as a chest X-ray interpretation, pulmonary function test results,

[10] The issue of responsible operator was not discussed at the 1992 hearing. However, the Director's Exhibits indicate that the Employer continued to controvert the issue up to the time the matter was referred to ALJ Gilday.

and arterial blood gas test results that Dr. Baker obtained in the course of conducting an evaluation of the Claimant for this medical report (DX 30).

The Claimant also presented, in his affirmative case, a medical report written by Dr. Emery Lane, as well as Dr. Lane's associated chest X-ray, pulmonary function studies, and arterial blood gas tests of the Claimant. Dr. Lane conducted his examination of the Claimant and submitted his report in 1990, in conjunction with the Claimant's previous claim (DX 1).

The Employer submitted a medical report from Dr. Abdul Dahhan, dated January 2002, along with an associated chest X-ray interpretation, pulmonary function test, and arterial blood gas test (DX 9). The Employer also submitted a medical report from Dr. Gregory Fino, dated September 2003 (DX 37). In its affirmative case, the Employer proffered an X-ray interpretation from Dr. Paul Wheeler of a January 2002 X-ray (the same X-ray that Dr. Dahhan also interpreted) (DX 10). In rebuttal of the Claimant's case, the Employer submitted Dr. Wheeler's interpretations of the Claimant's November 2001 X-ray (the one Dr. Hussain administered in conjunction with the Claimant's claim) and September 2002 X-ray (administered in connection with Dr. Baker's medical report) (DX 11, 37).

In rebuttal of the Employer's case, the Claimant submitted an X-ray interpretation by Dr. Michael Alexander of the Claimant's January 2002 X-ray (DX 37).

These items will be discussed in greater detail below.

F. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F.R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

Because this claim is a subsequent claim, it must be denied unless the Claimant can demonstrate that one or more applicable conditions of entitlement have changed since the denial of the prior claim. § 725.309(d). See Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004).

As § 725.309(d) states, the following rules pertain to the adjudication of subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim;

(3) If the applicable conditions of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement . . . .

1. Elements of Entitlement:

Pneumoconiosis Defined:

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical or "clinical" pneumoconiosis, and statutory, or "legal" pneumoconiosis, which themselves are defined in that subparagraph at (1) and (2). "Clinical" pneumoconiosis consists of diseases recognized by the medical community as pneumoconioses, characterized by permanent deposition of substantial amounts of particulates in the lungs, and the fibrotic reaction of the lung tissue, caused by dust exposure in coal mine employment. "Legal" pneumoconiosis includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. Further, § 718.201(b) states: "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[11]
(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

X-ray Evidence

Section 718.202(a)(1) states that a chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. ILO

[11] These are as follows: (a) an irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§ 718.304); (b) where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§ 718.305); or (c) a rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§ 718.306).

Classifications 1, 2, 3, A, B, or C shall establish the existence of pneumoconiosis. Category 0, including subcategories 0/0 and 0/1, do not establish pneumoconiosis.[12]

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Ex.No.	Physician	Radiological Credentials[13]	Interpretation
09/12/1990	09/12/1990	37	Lane	B reader	ILO: 1/0 (6 zones) [14]
11/14/2001	11/14/2001	16	Hussain	None	ILO: 1/1 (6 zones)
01/21/2002	03/04/2002	10	Wheeler	BCR, B reader	Neg. for pneumoconiosis; cannot rule out subtle interstitial infiltrate
01/21/2002	01/21/2002	9	Dahhan	B reader	Negative
01/21/2002	11/11/2002	31	Alexander	BCR, B reader	ILO: 1/2 (6 zones)
09/18/2002	09/18/2002	30	Baker	B reader	ILO: 1/0 (3 RZ, 2 LLZ)
09/18/2002	10/04/2003	37	Wheeler	BCR, B reader	Neg. for pneumoconiosis; oval mass right lower lung compatible w/ cancer or inflammatory disease

It is well established that the interpretation of an X-ray by a B reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a Board-certified radiologist as well as a B reader may be given more weight than that of a physician who is only a B reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). Additionally, a finder of fact is not required to accord greater weight to the most recent X-ray evidence of record. Rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to consider. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984).

In this matter, the X-ray evidence of pneumoconiosis is in dispute. There is a 1990 X-ray which a B reader interpreted as positive for pneumoconiosis. Dr. Hussain interpreted a 2001 X-

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[12] Category 1/0 is ILO Classification 1.

[13] A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Board of Radiology. See generally: http://www.answers.com/topic/radiology#after_ad1. A B reader is a physician who has demonstrated proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the National Institute for Occupational Safety and Health (NIOSH). NIOSH is a part of the Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. See 42 C.F.R. § 37.51 for a general description of the B reader program.

[14] The Claimant submitted this test result, which is included in the record pertaining to his previous claim (DX 1), in his affirmative case.

ray as positive for pneumoconiosis; however, Dr. Hussain has no specialized radiological credentials or expertise. Dr. Baker, a B reader, also interpreted a 2002 X-ray as positive for pneumoconiosis.

The Employer presented multiple X-ray interpretations from Dr. Wheeler, all of which are negative for pneumoconiosis. Dr. Wheeler is dually-qualified, as a Board-certified radiologist and B reader. Although Dr. Wheeler interpreted the Claimant's X-rays as negative for pneumoconiosis, he did note abnormalities in two of the three X-rays he interpreted. In rebuttal to Dr. Wheeler, the Claimant presented an interpretation of one of the X-rays Dr. Wheeler interpreted, by Dr. Alexander, who also is dually-qualified. Dr. Alexander interpreted this X-ray as positive for pneumoconiosis, in proliferation 1/2, with opacities in all six lung zones.

I give more weight to X-ray interpretations from dually-qualified physicians than X-ray interpretations from B readers. I give more weight to the former because Board-certified radiologists have more extensive training and experience in interpreting X-ray images than do B readers. Among physicians with equal qualifications (e.g., dually-qualified), I give equal weight to their interpretations. Consequently, in the Claimant's case, I give the most weight to the interpretations that Dr. Wheeler and Dr. Alexander made. Although Dr. Wheeler interpreted the Claimant's films as negative for pneumoconiosis, he noted abnormalities. Dr. Alexander, on the other hand, interpreted the X-ray of January 2002 [1/21/2002], which was the same film that Dr. Wheeler interpreted as negative for pneumoconiosis, as being positive for pneumoconiosis. A subsequent film, from September 2002 [9/18/2002], was not read by Dr. Alexander. This film was read as negative for pneumoconiosis by Dr. Wheeler, but Dr. Wheeler noted other abnormalities; Dr. Baker, a B reader but not a Board-certified radiologist, read that film as positive for pneumoconiosis.

I find that the X-ray evidence, summarized above, is in equipoise. Based on the X-ray evidence, I cannot determine whether the Claimant has pneumoconiosis, and therefore I must find that the Claimant has not established, by X-ray evidence, that he has pneumoconiosis. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). In making this finding, I am mindful that the Claimant established that he had pneumoconiosis, through X-ray, in his prior claim.

Biopsy or Autopsy Evidence

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is not available here, as the current record contains no such evidence.

Regulatory Presumptions

A determination of the existence of pneumoconiosis may also be made using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982.

§718.305(e). Section 718.306 applies only in cases of deceased miners who died before March 1, 1978. Since none of these presumptions applies in this case, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physician Opinion

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth in subparagraph (a)(4): A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Dr. Imtiaz Hussain (DX 12, 13, 14, 15, 16, 37; CX 1)

As noted above, Dr. Hussain conducted the pulmonary evaluation required by the Department of Labor in conjunction with the Claimant's claim. See § 725.406. Dr. Hussain is Board-certified in internal medicine and pulmonary disease. In November 2001, he examined the Claimant, took a medical and work history, and administered a chest X-ray, pulmonary function test, and arterial blood gas test. He submitted two written reports, the first in November 2001, and the second, in response to the District Director's request, in November 2004.

In his first written report, Dr. Hussain wrote that the Claimant smoked ½ pack of cigarettes daily since 1978. This report does not contain any information about the Claimant's coal mine employment, so it is unknown what Dr. Hussain knew about the Claimant's dust exposure history. In his initial report, Dr. Hussain diagnosed the Claimant as having pneumoconiosis and COPD [chronic obstructive pulmonary disease] and attributed those conditions to "dust exposure and tobacco abuse" (DX 12 at 4). Dr. Hussain also stated that the Claimant had an occupational lung disease related to dust exposure, and based his determination on "X-ray findings, history of exposure" (DX 12 at 5).

In his second report to the District Director, Dr. Hussain stated the Claimant had neither clinical nor legal pneumoconiosis (DX 37). As noted above, this determination takes into consideration seven years of coal mine employment. It is unclear, based on the evidence of record, how Dr. Hussain concluded that the Claimant had seven years of coal mine employment. Interestingly, the District Director's letter informed him that the Claimant had eight years of such employment.

Dr. Glen Baker (DX 30)

At the request of the Claimant, Dr. Baker, who is Board-certified in internal medicine and pulmonary disease and is a B reader, examined the Claimant in September 2002 and submitted a medical report (DX 30). The medical report contained the results of tests that Dr. Baker administered, including a chest X-ray, pulmonary function study, and arterial blood gas test, and also reflected the Claimant's work and medical history. In his written report, Dr. Baker

presumed that the Claimant worked 14 years in surface mines operating a rock drill and that he smoked for 23 years at the rate of one pack per day and continued to smoke at the time of the examination.

In his written report, Dr. Baker concluded that the Claimant had coal workers' pneumoconiosis, mild resting hypoxemia, and chronic obstructive airway disease with mild obstructive defect. Dr. Baker based his diagnosis of coal workers' pneumoconiosis on abnormal X-ray and significant history of dust exposure, and based his other diagnoses on medical test results (arterial blood gas tests and pulmonary function tests, respectively). Dr. Baker concluded that the Claimant's conditions were the result of coal dust exposure; he stated that the Claimant had a 14-year history of dust exposure running a drill, X-ray evidence of pneumoconiosis, and no other condition to account for these X-ray changes. Dr. Baker acknowledged that the Claimant had a 23 pack year history of smoking but also had a 14-year history of dust exposure, and concluded: "It is thought that any pulmonary impairment would be caused at least in part by his coal dust exposure" (DX 30 at 4).

Dr. Emery Lane (CX 1)

The Claimant submitted a medical report from Dr. Lane, which was included in the records pertaining to the Claimant's previous claim at DX 1. In September 1990, Dr. Lane examined the Claimant and submitted a medical report (DX 1). Dr. Lane's medical credentials are not a matter of record. The medical report contained the results of tests that Dr. Lane administered, including a chest X-ray, pulmonary function study, and arterial blood gas test, and included references to the Claimant's medical and work history. In his written report, Dr. Lane presumed that the Claimant worked 12 years in coal mines, primarily in surface mines, and that he smoked for 10 years at the rate of one pack per day and continued to smoke at the time of the examination.[15]

Dr. Lane concluded that the Claimant had occupational pneumoconiosis, primarily silicosis,[16] and that the Claimant also had chronic obstructive lung disease; however, Dr. Lane did not assign a cause to the latter condition.[17] Dr. Lane noted X-ray results indicating pneumoconiosis, but did not cite any other evidence in support of this conclusion. Additionally, Dr. Lane concluded that the Claimant's pulmonary function studies showed some impairment (values between 55% and 79% of predicted).

Dr. Abdul Dahhan (DX 9)

At the request of the Employer, Dr. Dahhan, who is Board-certified in internal medicine and pulmonary disease and is a B reader, examined the Claimant in January 2002 and submitted

[15] Dr. Lane's examination was about 11 years before Dr. Hussain's evaluation, and about 12 years before Dr. Baker's examination. The smoking histories, therefore, are consistent.

[16] The governing regulation recognizes silicosis as a form of clinical pneumoconiosis. See § 718.201(a)(1).

[17] Dr. Lane's medical report also noted a questionable mass in the Claimant's lung and indicated that carcinoma (cancer) needed to be ruled out.

a medical report (DX 9). The medical report contained the results of medical tests Dr. Dahhan administered, including a chest X-ray, pulmonary function study, and arterial blood gas test, and discussed the Claimant's medical and work history. In his written report, Dr. Dahhan presumed that the Claimant worked 15 years in surface mines operating a rock drill, and that he smoked for 23 years at the rate of one pack per day and continued to smoke at the time of the examination.

In his written medical report, Dr. Dahhan concluded that there was insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis based upon a negative chest X-ray, normal physical examination, normal blood gases, and mild obstructive ventilatory defect. As noted above, Dr. Dahhan interpreted the Claimant's chest X-ray as negative. Dr. Dahhan also found no evidence of pulmonary impairment or disability related to coal dust exposure, and concluded that the Claimant's mild ventilatory defect was due to smoking, with no evidence of total or permanent pulmonary disability (DX 9).

Dr. Gregory Fino (DX 37)[18]

At the request of the Employer, Dr. Fino, who is Board-certified in internal medicine and pulmonary disease and is a B reader, examined medical records relating to the Claimant and, in September 2003, submitted a medical report (DX 30). Dr. Fino's report included the review of multiple medical reports and records submitted in conjunction with the Claimant's previous claim (dating from 1990 to 1992), as well as the reports of Dr. Hussain, Dr. Dahhan, and Dr. Baker reports listed above; his report includes tables in which Dr. Fino listed different medical test results and summarized different physician opinions related to the Claimant.

Dr. Fino concluded that there was insufficient medical evidence to justify a diagnosis of coal workers' pneumoconiosis. Dr. Fino also stated that the Claimant had a mild and reversible respiratory impairment, with a variable degree of obstruction related to smoking. It is not clear what Dr. Fino presumed relating to the Claimant's coal mine employment and smoking histories, but Dr. Fino's report stated that the Claimant's most recent medical report, in September 2002, reflected 14 years as a rock drill operator, ending in 1989, and 23 years of smoking one pack per day, still ongoing. Dr. Fino also stated that he did not believe that the Claimant has any impairment related to coal mine dust (DX 37).

Discussion

A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989). Generally, a medical opinion is well documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields, supra. An opinion based on a physical examination, symptoms, and a patient's work and social histories may be found to be adequately documented. Hoffman v. B. and G Construction Co., 8 B.L.R. 1-65 (1985).

[18] Dr. Fino's report is complete in the record but it is scattered in several places within DX 37.

I give little weight to Dr. Hussain's determination, in his November 2004 statement, that the Claimant does not have pneumoconiosis or any coal dust related disease, because the basis for Dr. Hussain's determination is unclear. Notably, in his earlier report, in November 2001, Dr. Hussain had concluded that the Claimant had both pneumoconiosis and COPD, and he attributed the latter to both coal dust exposure and smoking. Dr. Hussain does not explain why his conclusions changed, and consequently I find that his determination is not well-reasoned. [19]

On the other hand, Dr. Baker's report, which concludes that the Claimant has both pneumoconiosis and COPD, and that both are causally related to coal mine employment, overstates the Claimant's coal mine employment history, by presuming that the Claimant has 14 years of such employment. As noted above, I have found that the Claimant has established 10 years of coal mine employment. Consequently, I find Dr. Baker's conclusion that the Claimant's chronic obstructive lung disease is caused at least partly by coal dust exposure not to be well-reasoned.

Although Dr. Dahhan and Dr. Fino do not diagnose the Claimant with clinical pneumoconiosis, neither do they rule it out. Instead, they both conclude that there is insufficient evidence to determine whether clinical pneumoconiosis is present in the Claimant. Interestingly, even though they presume more coal mine employment than has been established, both of these physicians conclude that the Claimant has only a mild ventilatory defect, due entirely to smoking.

Mindful of the fact that clinical pneumoconiosis may be present notwithstanding a negative X-ray, and also mindful of the fact that there is some X-ray evidence of pneumoconiosis regarding this Claimant, I find that Dr. Lane's and Dr. Baker's conclusion, that the Claimant has clinical pneumoconiosis, is consistent with Dr. Dahhan's and Dr. Fino's determination. Dr. Baker's conclusion, based in part on his own positive X-ray interpretation, is supported by Dr. Lane's medical report. Although Dr. Lane's observations of the Claimant date back more than 10 years prior to Dr. Baker, Dr. Lane's conclusion – that the Claimant has clinical pneumoconiosis – is based on a more accurate coal mine employment history (12 years rather than 14).

I find, consequently, that the Claimant has established, by a preponderance of evidence, through physician opinion, that he has clinical pneumoconiosis. This constitutes no change from the final denial of his previous claim, in 1994.[20]

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[19] From my examination of the record, the only factor that I can discern that may have impelled Dr. Hussain to change his conclusions is that the Director informed him in its letter that the Claimant had eight years of coal mine employment. In fact, Dr. Hussain's November 2004 opinion indicates that he considered the Claimant to have seven years of coal mine employment. If, indeed, the basis for Dr. Hussain's change of mind is the Claimant's coal mine employment history, then Dr. Hussain's opinion still must be considered unreasoned, because Dr. Hussain's opinion is based on fewer years of coal mine employment than either the Director informed him of, or that I found.

[20] I also find, based on the evidence presented, that the Claimant has not established that he has chronic obstructive lung disease arising out of coal mine employment. Assuming arguendo that

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). As noted above, the parties have stipulated that the Claimant has 10 years of coal mine employment. Therefore, he is entitled to benefit from this stipulation.

As noted above, I have found that the Claimant has established that he has clinical pneumoconiosis, as defined in the regulation. There is no evidence rebutting the presumption. Consequently, I find that the Claimant has established, by a preponderance of evidence that his pneumoconiosis arose out of coal mine employment. This constitutes no change since the prior denial of the Claimant's previous claim, in 1994.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment …requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). See also Beatty v. Danro Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

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the Claimant has established that he has chronic obstructive lung disease, I find that he has not established that his condition "arose out of coal mine employment" because the Claimant is unable to establish that his condition was significantly related to, or aggravated by, dust exposure in coal mine employment. Consequently, the Claimant is unable to establish that he has "legal" pneumoconiosis. "Legal pneumoconiosis," set out in § 718.201(a)(2), is defined as a "chronic lung disease or impairment…arising out of coal mine employment." Only one of the three pulmonary specialists, Dr. Baker, linked the Claimant's condition to coal dust exposure, and Dr. Baker presumed more years of coal dust exposure than the Claimant is able to establish.

Pulmonary Function Tests

The record contains the following pulmonary function test results (when two values are listed, the second value reflects measurements taken after a bronchodilator was used);

Date of Test	Physician	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
11/21/2001	Hussain	1.93/1.96	3.04/4.05	59/unk	63%/48%	Yes[21]
01/21/2002	Dahhan	2.16/2.22	3.11/3.19	Unk	69%/70%	Yes
09/18/2002	Baker	2.12	3.40	Unk	62%	Yes

In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The Claimant, who is male, was born in October 1939. Therefore, he was 62 years old at the time of the pulmonary function tests listed above. The records of his testing reflect his height at 69 inches; 170 centimeters [which is equivalent to 67 inches]; and 67 inches. The Claimant testified that he was five feet, nine inches tall (T. at 11). Taking the average of these heights, 68 inches, the qualifying value for the FEV1 is 1.84 at age 62. None of the pulmonary function tests record a qualifying value for the Claimant.

Based on the foregoing, therefore, I find that the Claimant is unable to show that he is totally disabled based on pulmonary function tests.

[21] The record reflects only one trial was done after bronchodilating medication was administered.

Arterial Blood Gas Tests

The record contains the following arterial blood gas test results:

Date of Test	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)
11/14/2001	Hussain	41.1	74.0	41.4	88.0
09/18/2002	Baker	42	78	No record	No record[22]
09/12/1990	Lane	35.8	71.4	Not done	Not done[23]

A Claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

The altitude at which Dr. Hussain administered the arterial blood gas test is less than 2999 feet. The altitudes at which Dr. Baker and Dr. Lane administered tests are not in the record, but I presume the altitudes in Corbin, Kentucky and Frankfort, Kentucky are 5999 feet or less. Based on a PCO_2 value of 35.8, a qualifying PO_2 value is 64 at 2999 feet of altitude or less, and 59 at 3000-5999 feet. Based upon a PCO_2 value between 41 and 42, the qualifying PO_2 value at 2999 feet or less is 60, and at 3000-5999 feet it is 55.

Based upon the foregoing, where no arterial blood gas test provided a qualifying value, I find that the Claimant is unable to establish that he is totally disabled by means of an arterial blood gas test.

Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). Although I have found that the Claimant has established the existence of clinical pneumoconiosis, there is no evidence of cor pulmonale with right sided congestive heart failure. Accordingly, I find that the Claimant has not established total disability under this provision.

[22] Dr. Baker referred to this test in his medical report(DX 30), but there is no separate record of the test's administration.

[23] The Claimant submitted this test result, which is included in the record pertaining to his previous claim (DX 1), in his affirmative case.

Physician Opinion

The final method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician, that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he based his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149, 1-155 (1989).

In his initial written report, Dr. Hussain opined that the Claimant had "moderate impairment" mainly due to his COPD. He indicated that the Claimant retained the respiratory capability to perform the work of a coal miner (DX 12 at 5). In his second written report Dr. Hussain again stated that the Claimant had a moderate impairment, but also opined that this impairment was attributable to smoking (DX 37 at 2). In his second report, Dr. Hussain did not specifically address whether the Claimant remained able to work in his usual coal mine employment.

Dr. Lane concluded that the Claimant retained the functional pulmonary capacity to work in his usual coal mine employment (CX 1). In his medical report, Dr. Baker concluded that the Claimant had a "Class 2 impairment" based on his pulmonary function test results. Also, Dr. Baker concluded that the Claimant had a second impairment, due to the presence of pneumoconiosis, which means he should limit exposure to the coal dust; therefore, this implies that the Claimant is 100% occupationally disabled for work in the coal mining industry or similar dusty occupation (DX 30 at 3).

Dr. Dahhan concluded that the Claimant had no pulmonary disability and, from a respiratory standpoint, retained the physiological capacity to perform his last coal mine employment. Dr. Dahhan based his conclusion on physical examination of the Claimant's chest as well as the results of the Claimant's pulmonary function and arterial blood gas tests (DX 9). Dr. Fino echoed Dr. Dahhan's conclusions; in short, Dr. Fino stated that the Claimant was not disabled, and retained the pulmonary capacity to perform his last mining job (DX 37).

Discussion

In this matter, I note that the Claimant is unable to establish, through objective medical test results, that he is totally disabled. He must rely, then, on physician opinion regarding his capability to perform coal mine employment. I give Dr. Lane's opinion little weight, because it addresses the Claimant's capabilities more than 10 years before he filed his claim. Although I find no flaw in Dr. Lane's conclusion, it is of little assistance in a determination regarding the Claimant's current condition. Taking Dr. Hussain's more recent opinion, that the Claimant has a moderate impairment, into consideration, I find that it is of little value, and I give it little weight

also. Dr. Hussain's statement does not address the issue, which is whether the Claimant retains the capacity to perform his last coal mine employment.

Likewise, Dr. Baker's opinion does not address the issue of the Claimant's capacity to perform the duties of his last coal mine employment, and I accordingly give his opinion little weight. I note that Dr. Baker has concluded that, due to the Claimant's pneumoconiosis, he should be considered 100% occupationally disabled for work in the coal mining industry. I find that this opinion, which is more accurately described as a recommendation that the Claimant not continue in coal mine employment, is not the equivalent of a determination that the Claimant is totally disabled. See Jeffrey v. Mingo Logan Coal Co., B.R.B. No. 05-0107 B.L.A. (Sep 22, 2005); White v. New White Coal Co., 23 B.L.R. 1-1 (2004).

I find Dr. Fino's opinion not well-reasoned, based primarily on the fact that it is conclusory in nature. Although Dr. Fino lists a large number of objective tests administered to the Claimant, he does not discuss how, if at all, the test results lead him to determine that the Claimant is not totally disabled. Dr. Dahhan, on the other hand, cites the results of objective medical tests, as well as his physical examination of the Claimant, as the bases for his determination that the Claimant is not totally disabled. Moreover, Dr. Dahhan's opinion is based on his understanding that the Claimant's last coal mine employment was as a rock driller on a strip mine site. Dr. Dahhan's conclusion, therefore, is based upon the factual assessment of the physical and exertional requirements of this work, as is required. See Brigance v. Peabody Coal Co., B.R.B. No. 05-0722 B.L.A. (June 29, 2006)(en banc). Because Dr. Dahhan's opinion is based on objective test results, as the regulation requires in § 718.204(b)(2)(iv), and is informed by an understanding of the nature of the Claimant's last job in the coal mines, I find it to be well-reasoned.

Based on the evidence, therefore, I find that the Claimant is unable to establish, through physician opinion, that he is totally disabled within the meaning of the governing regulation. Further, I find that the Claimant is unable to establish, by a preponderance of evidence, that he is totally disabled, within the meaning of the governing regulation. This constitutes no change since the final denial of the Claimant's previous claim, in 1994.

d. Whether the Claimant's disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c); Grundy Mining Co. v. Flynn, 353 F.3d 467 (6th Cir. 2004); Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990). The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. A Claimant can establish this element through a physician's documented and reasoned medical report. §718.204(c).

As set forth above, I have found that the Claimant is unable to establish that he is totally disabled. Consequently, I must also find that he is unable to establish, by a preponderance of evidence, that he is totally disabled due to pneumoconiosis. This constitutes no change since the final denial of the Claimant's previous claim, in 1994.

E. Subsequent Claim

As § 725.309 sets forth, a subsequent claim must be denied unless the Claimant can establish that one of the applicable conditions of entitlement has changed since the date upon which the previous claim became final. In his previous claim, the Claimant established that he had pneumoconiosis, and that his pneumoconiosis arose from his coal mine employment. He was unable to establish that he was totally disabled, or that his total disability was due to pneumoconiosis. As discussed above, I have found that the Claimant is unable to establish, by a preponderance of evidence, either of the two elements that he previously had failed to establish. Consequently, as § 725.309(d) requires, his claim must be denied.

IV. CONCLUSION

Based upon applicable law and my review of all of the evidence, I find that the Claimant has not established his entitlement to benefits under the Act.

V. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which a Claimant is represented by counsel and is found to be entitled to benefits under the Act. Because benefits were not awarded in this Claim, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the Claim.

VI. ORDER

The Claimant's Claim for benefits under the Act is DENIED.

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Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of

Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).